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No. 528

Supreme Court of the United States

October Term, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

vs.

SELBY OIL AND GAS COMPANY, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

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INDEX

AUTHORITIES

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BRIEF FOR RESPONDENTS

Petitioners have not filed any brief in this case except their brief in support of the petition for writ of certiorari. This brief for Respondent is directed to that brief.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is reported under the style of *Selby Oil & Gas Company*

et al vs. Railroad Commission et al, 128 Fed. (2d) 334, and is copied in the record at pages 106-112.

NATURE OF THE CASE

Petitioners' statement of the nature of the case is inadequate.

Respondents Selby Oil and Gas Company and Lewis Production Company were plaintiffs in the trial court and appellants in the Circuit Court of Appeals. Petitioners were defendants in the trial court, and appellees in the Circuit Court of Appeals.

The suit, brought in the United States District Court for the Western District of Texas, Austin Division, challenged validity of an order of the Railroad Commission of Texas granting Petitioners Hastings and Dodson a permit, as an exception to Rule 37[1], to drill a second well for oil and gas on a 3.85-acre tract of land in the proven area of the East Texas oil field. The bill of complaint asked for judgment cancelling the order and permit, and for injunction restraining drilling and operation of the well. (R., 4-11.)

The suit presented two claims for relief; first, that the result of the order of the Commission would be to deprive Respondents of their property without due process of law, and second, that the order was arbitrary and unreasonable and not supported by evidence. (R., 4-11.) The first claim asserted a right under the Fourteenth Amendment to the Constitution of the United States, and jurisdiction rested on the presence of a Federal question arising under the

[1]Pertinent parts copied, Appendix, *post*, page 24.

Fourteenth Amendment. As to the second claim, the suit was to enforce rights granted by Section 8, Article 6049(c), Vernon's Texas Annotated Civil Statutes, 1925,[1] and jurisdiction rested on diversity of citizenship.[2]

The trial court, on July 18, 1940, on the basis of the original opinion in *Railroad Commission vs. Rowan and Nichols Oil Company*, 310 U. S. 573 (decided June 3, 1940), at the conclusion of the Respondents' testimony, without making findings of fact or expressing judgment on the testimony, sustained Petitioners' motion for judgment, upon the theory that cases of this character are not cognizable in the Federal courts. (R., 102-103, 108-109.)

STATEMENT OF THE TESTIMONY

The order of the Commission granting the permit stated that it "should be granted to prevent confiscation of property[3]." (R. 107.) The report made to

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[1]Copied in Appendix, *post*, page 25.

[2]Reagan vs. Farmers Loan & Trust Company, 154 U. S. 362; McMillan vs. Railroad Commission of Texas, 51 Fed. (2d) 400; Gulf Land Company vs. Atlantic Refining Compeny, 113 Fed. (2d) 902; Stanolind Oil & Gas Company vs. Ambrose, 118 Fed. (2d) 847.

[3]Rule 37. Nos. 2 & 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas. Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

"The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such ex-

the Commission by the examiner who, on April 26, 1939, held the Commission hearing on the application for the permit, stated that, "The testimony was that on the spacing arrangement there is no immediate loss of oil on Applicant's (Hastings and Dodson's) lease." (Ex. 6; R., 59, 70.) The challenged order granted a permit to drill a second well on a 3.85-acre tract (Ex. 2; R., 59, 63, 64) in the proven area of the East Texas field. Respondents owned an oil and gas lease on a tract of land adjoining the 3.85-acre tract. (Ex. 1; R., 59, 62, 63.) The well on the 3.85-acre tract and each well on each adjoining tract was, at the time the Commission acted, under field-wide orders of the Comission, allowed to daily produce 20 barrels of oil. (R., 67, 98-99); the 3.85-acre tract was drilled to a greater density than the average of the surrounding tracts (R., 81-82); and to a greater density than the average of the East Texas field (R., 98). The 3.85-acre tract had, at the time of the hearing on the application, produced more oil per acre than the average of surrounding leases (R., 85); the number of barrels of oil allowed to be produced per acre per day from the 3.85-acre

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ception and that same should be granted to prevent confiscation of property;

"Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2, to be spaced as follows:

No. 2—150 feet east of the west lines;
130 feet southwest of well No. 1.

"It is Further Ordered that well No. 3 is hereby denied."

tract exceeded the average per acre per day production allowed to the surrounding leases (R., 86). The existing well on the 3.85-acre tract was sufficient to produce the tract's fair share of the recoverable oil, and on a basis of 20 barrels per day allowable would recover an amount of oil substantially equivalent to the amount of recoverable oil originally in place, and in place under the lease at the time of the hearing on the application and at the time the order was made granting the permit. (R., 87.) The drilling and production of a second well on the 3.85-acre tract would result in that tract having a production and drainage advantage over each and every adjoining tract. (R., 88.) At the time the hearing was held on the application, and at the time the permit was granted, the 3.85-acre tract was not suffering drainage of oil to other leases that would ultimately result in its owners being prevented from recovering an amount of oil substantially equivalent to the amount of recoverable oil in place under the lease. (R., 88.) The drilling of a second well on the 3.85-acre lease and the production of oil from that well would result in more oil being recovered from that tract than the amount of recoverable oil in place under the tract (R., 88), and in the drainage of large quantities of oil (estimated at approximately 80,000 barrels) from Respondents' lease (R., 77, 94-95). Respondents, like Petitioners Hastings and Dodson, without a second well on the 3.85-acre tract, had sufficient wells to produce the recoverable oil under their tract. (R., 87.) The drilling of an offset well on Respondents' tract to the well involved in this suit would not prevent, but only reduce, the drainage caused by a

second well on the 3.85-acre tract (R., 92), and would cost Respondents some ten or twelve thousand dollars (R., 93.) If density of drilling on the 3.85-acre tract is compared with the density of drilling on a surrounding area of eight times the size of the 3.85-acre tract it appears that the 3.85-acre tract would be at a 37½% density disadvantage. (R., 92.) Such an area, however, did not take into account all of the 149.8 acres included in the surrounding leases. (R., 74-75.)

The testimony was from Mr. R. D. Parker (R., 72-99), whose qualifications as an expert were admitted. (R., 71.)

SUMMARY OF THE ARGUMENT

Counter-Point I.

The holding of the Circuit Court of Appeals that Respondents were entitled to a hearing in the trial court on the issue of confiscation in violation of the Fourteenth Amendment, and on the issue of the validity of the Commission order as unreasonable and unsupported by substantial evidence, was not in conflict with the opinions of this court.

Authorities

Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 391-392.

Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co., 212 U. S. 414, 420.

Railroad Commission of Texas vs. Rowan & Nichols Oil Co., 310 U. S. 573; 311 U. S. 614.

Railroad Commission of Texas vs. Rowan & Nichols Oil Co., 311 U. S. 570.

Siler vs. Louisville & Nashville Ry. Co., 213 U. S. 175, 191.

Green vs. Louisville Ry. Co., 244 U. S. 499, 508.

Railroad Commission vs. Pullman Co., 312 U. S. 496.

City of Chicago vs. Fieldcrest Dairies Corp., 316 U. S. 168.

McMillan et al vs. Railroad Commission, et al, 51 Fed. (2d) 400.

Gulf Land Co., et al vs. Atlantic Refining Co., et al, 113 Fed. (2d) 902.

Stanolind Oil & Gas Co. vs. Ambrose, 118 Fed. (2d) 847.

Cook Drilling Co. et al vs. Gulf Oil Corp., 139 Tex. ——, 161 S. W. (2d) 1035, 1036.

Railroad Commission of Texas et al vs. Shell Oil Co., Inc., et al, 139 Tex. ——, 161 S. W. (2d) 1022, 1029.

Gulf Land Co. vs. Atlantic Refining Co., 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.

Article 3, Sec. 2, Clause 1, Constitution of the United States.

Section 41(1)(b), Title 28, United States Code Annotated.

Section 8 of Article 6049c, Vernon's Texas Civil Statutes 1925.

Railroad Commission Rule 37.

Counter-Point II.

The testimony did not show as a matter of law that the order of the Commission was valid.

Authorities

Gulf Land Co. vs. Atlantic Refining Co., 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.

Railroad Commission et al vs. Shell Oil Co., Inc., et al, 139 Tex. —— 161 S. W. (2d) 1022, 1029.

Counter-Point III.

Where the trial court decided the suit upon the erroneous belief that it was not a suit within the jurisdiction of the court, it was proper for the Circuit Court of Appeals to remand for the trial court to make findings on the facts.

Authorities

Rule 52, *Rules of Civil Procedure for the District Courts of the United States.*

ARGUMENT

1.

The holding of the Circuit Court of Appeals that Respondents were entitled to a hearing in the trial court on the issue of confiscation in violation of the Fourteenth Amendment, and on the issue of the validity of the Commission order as unreasonable and unsupported by substantial evidence, was not in conflict with the opinions of this court.

Jurisdiction of the Federal courts to determine the merits of the claim asserted under the Fourteenth Amedment is not open to question. Jurisdiction of these courts to determine the merits of the claim that the order is unreasonable, arbitrary and

unsupported by evidence, differing, if it does differ, from the claim that the results of the order will be to take Respondents' property without due process, is equally certain. Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, grants to any person whose property rights are affected by an order of the Railroad Commission the right to attack the order as unreasonable, arbitrary or without evidentiary support, although it may not be in violation of the Constitution. *(Gulf Land Co. et al vs. Atlantic Refining Co. et al*, 134 Tex. 59, 131 S. W. (2d) 73; *Railroad Commission et al vs. Shell Oil Co., Inc., et al*, 139 Tex. ——, 161 S. W. (2d) 1022, 1029-1030; *Cook Drilling Co. et al vs. Gulf Oil Corporation*, 139 Tex. ——, 161 S. W. (2d) 1035, 1036.) Section 8 of Article 6049c is not a procedural statute, but one that affects the substantive rights of the parties. Where the right granted by the statute is asserted in a Federal Court (certainly in cases where jurisdiction rests on diversity of citizenship), the Federal Court should apply the law of the state in determining the merits of the claim. *(Erie R. Co. vs. Tompkins*, 304 U. S. 64, 78-80.)

Article III, Section 2, Clause 1, of the Constitution of the United States, grants to the federal courts jurisdiction of controversies between citizens of different states, and Section 41 (1) (b), Title 28, United States Code Annotated, places jurisdiction of such controversies in the District Courts of the United States. In *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391-392, of a similar statute allowing appeals from orders of the Railroad Commission, the court said:

> * * * "For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another State having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts." * * *
>
> "We need not, however, rest on the general power of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit."

In *Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 420, of a constitutional provision giving a right of appeal to the courts for review of Commission orders, the court said:

> * * * "The single question before us is as to the character of the rates provided in Order No. 532, whether such rates are confiscatory, or, if there is any difference, whether the rates are only unreasonable, unjust and inadequate, although not confiscatory, and, therefore, not in violation of the Federal Constitution. The question un-

> der Atricles 284 and 285 of the Constitution of Louisiana, *supra*, even of the unreasonableness of the rates, may be inquired into by a Federal court, by reason of the diverse citizenship of the parties to this suit, and the complainant is not confined to a state court upon this question."

The principle announced in these cases has been followed by Federal courts in taking jurisdiction of suits against the Railroad Commission of Texas. (*McMillan et al vs. Railroad Commission*, 51 Fed. (2d) 400; *Gulf Land Co. vs. Atlantic Refining Co.*, 113 Fed. (2d) 902; *Stanolind Oil & Gas Co. vs. Ambrose*, 118 Fed. (2d) 847.

Neither the original opinion in the first *Rowan & Nichols* case (*Railroad Commission et al vs. Rowan & Nichols Oil Co. et al.*, 310 U. S. 573) nor any of the other opinions relied upon by Petitioners (on rehearing, *Railroad Commission et al vs. Rowan & Nichols Oil Co.*, 311 U. S. 614; *Railroad Commission et al vs. Rowan & Nichols Oil Co.*, 311 U. S. 570; *Railroad Commission et al vs. Pullman Co.*, 312 U. S. 496; *City of Chicago et al vs. Fieldcrest Dairies, Inc.*, 316 U. S. 168) support Petitioners' contention that the Circuit Court of Appeals erred in holding that the United States District Court for the Western District of Texas had jurisdiction of Respondent's suit and that Respondent was entitled to have the judgment of that court on the issues of fact involved in the case.

In the original opinion in the first *Rowan & Nichols* case (310 U. S. 580), the court said:

> * * * "Except where jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power."

On petition for rehearing the above quoted statement was challenged, and with citation to *Siler vs. Louisville & Nashville Ry. Co.*, 213 U. S. 175, 191, and *Green vs. Louisville Ry. Co.*, 244 U. S. 499. 508, it was contended that jurisdiction having attached, it extends to the case as destinguished from the question upon which jurisdiction of the court rests. Jurisdiction in the *Rowan & Nichols* cases was grounded on a federal question. In the opinion on motion for rehearing (311 U. S. 614), the court withdrew the above quoted sentence from the original opinion and stated that "the presence of a federal question may also open up state issues."

The question of local law involved in the first *Rowan & Nichols* case was a claim founded on the state statute requiring that proration be on a "reasonable basis." The court stated that the available Texas decisions did not make clear "whether the local courts may exercise an independent judgment on what is 'reasonable,'" and concluded that from such Texas decisions as were available it appeared that "the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the Respondent in effect asserted to exist in his claim under the Due Process Clause." Having ruled that the claims of Rowan & Nichols Oil Company under

the Due Process Clause were untenable, the court disposed of the question arising under local law by stating: "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not be attempted by these courts under the guise of enforcing a state statute."

The meaning of the original opinion (310 U. S. 580) and the opinion on motion for rehearing (311 U. S. 614) in the first *Rowan & Nichols* case is perfectly clear. In so far as the question now under discussion is concerned they mean that where jurisdiction rests on a federal question, questions arising under local law may also be decided when necessary to a correct disposition of the case; but where a claim made under the Due Process Clause has been found untenable, a claim made under local law that involves the same range of inquiry will be denied.

Deletion of the above quoted sentence from the original opinion and the disposition made by the court of the question arising under local law did not mean, as Petitioners seem to think, that the court denied jurisdiction of the Federal Courts over "all litigation where a state statutory remedy is involved."

In the second *Rowan & Nichols* case (311 U. S. 577), the court did state: "In denying the petition for rehearing in the earlier case we held that whatever rights the state statute may afford are to be pursued in the state courts." The statement should be read in the light of the opinion on rehearing in the first case, stating that the Texas courts had not determined the scope of judicial inquiry contem-

plated by the state statute which was made the basis of the local question of law involved.

Points of difference between this case and the *Rowan & Nichols* cases which distinguished this case from those cases are: (1) Jurisdiction in this case is founded both on the presence of a federal question and on diversity of citizenship. Jurisdiction in the *Rowan & Nichols* cases was founded alone on the presence of a federal question. (2) Entry of the Railroad Commission order under attack in this case involved the exercise of *quasi* judicial power. The Railroad Commission regulations involved in the *Rowan & Nichols* cases were legislative in character. (3) As will hereafter be shown, the Supreme Court of Texas has determined the scope of judicial inquiry contemplated by the Texas statute under which local questions arise in this case. This court determined in the *Rowan & Nichols* case (311 U. S. 615) that the Texas courts had not definitely determined the scope of judicial review contemplated by the statute under which the local question arose in that case.

The point decided in *Railroad Commission, et al vs. Pullman Company*, 312 U. S. 496, and in *City of Chicago, et al vs. Fieldcrest Dairies, Inc.*, 316 U. S. 168, upon which Petitioners rely here, is that where a suit involves questions arising under the Constitution of the United States, but decision of such questions may be avoided by a construction of a local statute by the courts of the state, and such statute has not been construed by the court of last resort of the state, the Federal Courts will withhold determination of the question of constitutional law, pending the parties litigating the question of local law in the state courts. This court will not make "a tenta-

tive answer which may be displaced tomorrow by a state adjudication." (312 U. S. 500; 316 U. S. 172.)

The rule adopted in the *Pullman* and *Fieldcrest Dairies* cases is not applicable here, because the only questions of local law involved in this case are the scope of judicial inquiry permissible under Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, and the meaning of "confiscation" as used in Rule 37; and those questions have been determined by the Supreme Court of Texas in the following cases.

In *Cook Drilling Co., et al vs. Gulf Oil Corp.*, 139 Tex. ———, 161 S. W. (2d) 1035, 1036, the Supreme Court of Texas determined the scope of judicial review contemplated by Section 8 of Article 6049c, in suits challenging orders of the Railroad Commission granting permits to drill wells in exception to the general spacing provisions of Rule 37. There the court said:

> "The trial contemplated by the Act in question (Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925) is not for the purpose of determining whether the Commission actually heard sufficient evidence to support its order, but whether there then existed sufficient facts to justify the entry thereof. Since there is to be a full hearing of the facts in the district court, whether the Commission actually heard sufficient evidence to sustain the order is not material. * * * The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or

did not, then exist suficient facts to justify the entry of the same."

In *Railroad Commission of Texas, et al vs. Shell Oil Co., Inc.*, 139 Tex.————————, 161 S. W. (2d) 1022, 1029-1930, the Supreme Court of Texas again stated the scope of review contemplated by Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, in suits such as this, saying:

> * * * "It will be noted that the above statute (Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, heretofore quoted) refers to the action as a 'suit.' It further provides that 'In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order.' A trial generally includes a judicial examination of the issues between the parties, whether of law or of fact. 42 Words and Phrases, p. 481. Moreover, there would have been no necessity for the placing of the burden of proof if proof was not to be heard. The Act in question clearly contemplates that the evidence shall be taken anew in the district court.
>
> * * ***"Nevertheless, when the validity of an order of such an agency is contested in court, certain presumptions are indulged in favor of the validity of such order in some instances. If the matter covered by the order is one committed to the agency by the Legislature, and involves the exercise of its sound judgment and discretion in the administration of the matter so committed to it, the court will not undertake to put itself in the position of the agency, and de-

termine the wisdom or advisability of the particular ruling or order in question, but will sustain the action of the agency so long as its conclusions are reasonably supported by substantial evidence. * * * Hence it is generally recognized that where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order if the action of the agency in reaching such conclusion is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that conmitted to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

* * * "The fact, however, that in some instances the action of the agency is to be sustained, if it is reasonably supported by substantial evidence, does not militate against the hearing of the evidence anew in

> the trial court. In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same."

In *Gulf Land Co. et al vs. Atlantic Refining Co., et al.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80, the court construed the term "confiscation," as used in Rule 37, as follows:

> * * * As used in Rule 37 and the rule of May 29th, the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under one of the exceptions in Rule 37, well permits may be granted to prevent "confiscation.' It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the rule of May 29th. Empire Gas & Fuel Co. vs. Railroad Commission, Tex. Civ. App.,

94 S. W. (2d) 1240, writ refused. The right to be protected against confiscation under commission oil and gas rules is not absolutely unconditional or unlimited."

Obviously the trial court had jurisdiction of both claims involved in this suit, and Respondents had a right to have the issue of fact determined by the trial court.

Counter-Point II.

The testimony did not show as a matter of law that the order of the Commission was valid.

The trial court did not purport to make findings of fact in this case or to decide the case upon the legal effect of the testimony. (R., 102-103.) The Circuit Court of Appeals made a statement (R., 108) of the nature of the testimony introduced upon the trial of the case. This statement might be regarded as the findings of fact of that court, but for the action of the court in stating that Respondents and the Circuit Court of Appeals were deprived of the judgment of trial court on the facts, and the remand of the cause for the trial court's findings and judgment on the facts.

It was permissible for the trial court to hear the facts anew. *(Railroad Commission et al vs. Shell Oil Co., Inc., et al*, 139 Tex. ——, 161 S. W. (2d) 1022, 1029.)

It appears from the foregoing statement of the undisputed testimony that at the time of the Railroad Commission hearing, the 3.85-acre tract of Pe-

titioners Hastings and Dodson's was not being drained by wells on adjoining leases (R., 88); that the tract with one well enjoyed a drilling density advantage over the average of the surrounding leases and over the average of the entire East Texas field (R., 82, 98); that the tract enjoyed a production advantage over the average of the surrounding leases (R., 85, 86); that the existing well on the tract would produce the tract's fair share of the recoverable oil, and an amount of oil substantially equivalent to the recoverable oil under the tract (R., 87); that the drilling and operation of the proposed second well would give the 3.85-acre tract production and drainage advantage over each and every surrounding lease (R., 88), and result in its owners recovering more oil than the amount of recoverable oil under the tract (R., 88); that the drilling and operation of the proposed second well would result in draining large quantities of oil from Respondent's adjoining lease (R., 77, 94-95); that Petitioners Hastings and Dodson's existing well and Respondents' existing wells were sufficient to produce the oil of their respective leases (R., 87); that the drilling by Respondents of an offset well to the proposed well would not prevent the draining of Respondents' lease by the proposed well, but only reduce the extent of drainage (R., 92), and such an offset well would cost Respondents between ten and twelve thousand dollars (R., 93).

For some unaccountable reason the Commission based its order on the ground that the permit "should be granted to prevent confiscation of property." (R., 107.) This statement was made in the

order notwithstanding the fact that the Railroad Commission Examiner who held the hearing on the application reported to the Commission that "the testimony was that on the spacing arrangement there is no immediate loss of oil on applicant's (Hastings and Dodson's) lease." (Ex. 6; R., 59, 70, 71.)

The Supreme Court of Texas, in *Gulf Land Co., et al vs. Atlantic Refining Co., et al*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80, defined the term "confiscation," as used in Rule 37, as follows:

> * * * "As used in Rule 37 and the Rule of May 29th, the term 'confiscation' evidently has reference to deprivinig the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under one of the exceptions in Rule 37, well permits may be granted to prevent 'confiscation.' It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th."

Reasonable minds cannot differ as to the inference to be drawn from the undisputed testimony stated above. It definitely appears therefrom that Petitioners Hastings and Dodson were not suffering "confiscation" of their oil and gas; that their lease was not suffering drainage to wells on adjoining leases. The testimony was equally convincing that

the drilling of the proposed well and the production of oil from it would take Respondents' property, while they stood bound by the Commission orders and without means or ways to prevent the taking of their property.

Certainly the testimony was sufficient to show that the order of the Commission was not supported by any evidence, that the order granting the permit was arbitrary and unreasonable, and that its effect would be to deprive Respondents of their property without due process.

Counter-Point III.

Where the trial court decided the suit upon the erroneous belief that it was not a suit within the jurisdiction of the court, it was proper for the Circuit Court of Appeals to remand for the trial court to make findings on the facts.

Rule 52, **Rules of Civil Procedure for the District Courts of the United States,** provides that "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereof." The purpose of the Rule is to give the appellate courts the benefit of the judgment of the trial court on the facts. When it appears from the record that the trial court erroneously determined that the suit was not one within the jurisdiction of the court, and for that reason the case was reversed on appeal, it was proper to remand for the purpose stated.

WHEREFORE, it is respectfully submitted that

the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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DAN MOODY,
Austin, Texas,
Attorneys for Respondents.

Copies of this Brief have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistnts Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

Attorney for Respondents.

APPENDIX

Rule 37 contains the following pertinent provisions:

> "No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property * * * ."

Article 6049c, Section 8, Vernon's Texas Civil Statutes, 1925, provides:

> "Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."